IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WACKER NEUSON CORPORATION,

Plaintiff,

v.

EQUIPMENT SOURCE, INC.,

Defendant.

Case No. 1:09-cv-235

Hon. Robert J. Jonker
U.S. District Judge

STIPULATION AND PROTECTIVE ORDER

WHEREAS, Plaintiff Wacker Neuson Corporation ("Wacker") and Defendant Equipment Source, Inc. ("ESI") believe that certain information that is or may be sought by discovery requests in this action constitutes trade secrets or other confidential research, development or commercial information within the meaning of Fed. R. Civ. P. 26(c); and

WHEREAS, the parties believe that it would facilitate discovery to produce such information under a protective order pursuant to Fed. R. Civ. P. 26(c);

IT IS HEREBY STIPULATED, subject to the approval of the Court, that:

1. As used herein, "Confidential Information" refers to information which a party or non-party claims to be its trade secret or confidential research, development or commercial information within the meaning of Fed. R. Civ. P. 26(c). In determining the scope of information which a party may designate as its Confidential Information, each party acknowledges the importance of client access to all information material to client decision-making in the prosecution or defense of litigation, and therefore agrees that designations of information as Confidential Information and responses to requests to permit further disclosure of

Confidential Information shall be made in good faith and not to impose burden or delay on an opposing party, or for tactical or other advantage in litigation. Further, each party agrees to make its best efforts to avoid as much as possible inclusion of Confidential Information in briefs and other captioned documents filed in court, in order to minimize sealing and designating as Confidential such documents.

2. Information to be treated under this Protective Order as Confidential Information shall include:

a. information set forth in response to discovery requests made under Fed. R. Civ. P. 31, 33 or 36, provided that, prior to disclosure to the receiving party, the information or responses are plainly marked or otherwise identified by the producing party on at least the caption page with a legend bearing the word "CONFIDENTIAL" and referring to this Protective Order;

b. information set forth in documents made available for inspection by the producing party voluntarily or under Fed. R. Civ. P. 33(d) or 34 and which are identified at the time of inspection as comprising Confidential Information;

c. information set forth in any copies of documents produced to the discovering party voluntarily or under Fed. R. Civ. P. 33(d) or 34, provided that, prior to delivery of the copies to the receiving party, the copies are marked by the producing party, preferably at the lower right corner of each page, with a legend bearing the word "CONFIDENTIAL" and an identifying document control number prefixed with one or more letters identifying the producing party;

d. information revealed by inspection of things or premises voluntarily or under Fed. R. Civ. P. 34, provided that, prior to the inspection, the party permitting inspection states in writing that its Confidential Information will be disclosed by the inspection and specifies in writing those parts of the things or those areas of the premises in which its Confidential Information will be revealed;

e. information revealed during depositions upon oral examination under Fed. R. Civ. P. 30 or pursuant to subpoena under Fed. R. Civ. P. 45, except that the information revealed during any particular deposition shall cease to be Confidential Information thirty (30) days after the deposition transcript is received by the producing party, unless before the thirty (30) day period has expired, the witness, his employer, his former employer, counsel of record in this action, or the witness's counsel designates in writing that Confidential Information of the witness or his employer is set forth in the transcript and identifies in writing the portions of the transcript that set forth that Confidential Information. In the case of non-party witnesses, either a party or the non-party witness may designate information revealed as its Confidential Information within thirty (30) days after receipt of the deposition transcript;

f. any summary, digest, analysis, comment on or other derivative work prepared from any information identified in categories (a) – (e).

3. In the event that information which a party believes is entitled to protection as Confidential Information as inadvertently produced or any inspection proceeds without the proper designation hereunder, the producing party may notify the receiving party, and the receiving party shall thereafter treat the information as Confidential Information. If, prior to receiving such notice, the receiving party has disseminated the Confidential Information to individuals not authorized to receive it hereunder, it shall make a reasonable effort to retrieve the Confidential Information or to otherwise assure that the recipient(s) maintain the confidentiality

of the Confidential Information, but shall have no other responsibility or obligation in respect to the information disseminated.

4. Confidential Information shall be disclosed only to (a) the Court under seal, (b) the parties' respective outside counsel (including support staff) as reasonably necessary, (c) outside stenographic court reporters, computer consultants and support personnel and language translators (including support staff) as reasonably necessary, and (d) the additional individual listed in items (i) through (vii) below, provided such additional individual has read this Stipulation and Protective Order in advance of disclosure and signed an Undertaking in the form attached as Exhibit A, which shall be retained in the files of outside counsel:

(i) any personnel employed by Wacker or ESI who are responsible for and/or working directly in the prosecution or defense of this action;

(ii) outside experts retained in this action;

(iii) non-testifying experts and outside consultants specially retained for this action;

(iv) a deponent or other witness who before the start of this action, authored, received or saw a document or thing that has now been marked "CONFIDENTIAL" or who is otherwise familiar with the Confidential Information, but only to the extent of the person's familiarity with the Confidential Information;

(v) representatives of the parties' respective insurers who have agreed to provide coverage with respect to the defense of claims in this action, or to whom notice of this action is otherwise required;

(vi) paralegals, stenographic, clerical or support staff employees and translators associated with the individuals enumerated in (i) – (iv) above, but only as part of a disclosure to said individuals in accordance with this stipulation and order, and;

(vii) such other individuals as the parties may stipulate.

5. The parties may designate especially sensitive Confidential Information as being produced for ATTORNEYS EYES ONLY. This designation shall be made in good faith and as sparingly as possible. Where the marking or designation of documents, testimony, pleadings, or things is required under paragraph 2 above, a legend bearing the words "ATTORNEYS EYES ONLY" or its equivalent shall be used in addition to the legend bearing the word "CONFIDENTIAL." Confidential Information which is designated ATTORNEYS EYES ONLY may be disclosed to any of the individuals identified in paragraph 4 above except that it shall not be disclosed to the personnel identified in paragraph 4(i).

6. Any disclosure of Confidential Information to an individual listed in items (i) through (vi) under paragraph 4 above shall be limited to the information, documents and/or things which outside counsel for the party making the disclosure believes are reasonably required for such individual to assist in this action.

7. Confidential Information shall be revealed by the receiving party only to the persons permitted access to it pursuant to paragraphs 4 and 5 above, and shall not be disclosed by the receiving party to persons other than those specified in paragraphs 4 and 5. Confidential Information shall be used by the receiving party solely for the purposes of this action.

8. If a document containing Confidential Information is filed with the Court, it shall be filed with the Clerk of the Court in a sealed envelope marked with the caption of the case, a schedule of the contents of the envelope, and the following notation:

"Contains CONFIDENTIAL INFORMATION;

To be Opened Only By or As Directed By the Court" or with such other designation as is ordered by the Court or as required by the Clerk of the Court.

9. Should need arise during the trial or any hearing before the Court a party may cause Confidential Information to be disclosed only after appropriate in camera inspection or other safeguards are requested of the Court or are otherwise ordered by the Court.

10. This Stipulation and Protective Order shall not prevent any party from moving this Court for an order that information is or is not Confidential Information, provided that, prior to making such a motion the parties shall meet and confer in good faith to resolve any differences over the designation. On such a motion, the party asserting confidentiality shall have the burden of proving that the Confidential Information in question is protectable under Fed. R. Civ. P. 26(c) or on some other basis. A party shall not be obligated to challenge the propriety of a designation of Confidential Information at the time made, and failure to do so shall not preclude subsequent challenge. However, if a party does challenge a designation, it shall be done in writing and the challenged information shall remain confidential until the issue is resolved by the Court. If a party believes the producing party's designation of information as ATTORNEYS EYES ONLY is not appropriate, that party may challenge that designation in writing. Upon the producing party's receipt of such a written challenge, the parties shall meet and confer in good faith to resolve any differences over the designation. If the parties are unable to resolve their differences, the producing party shall, within 15 calendar days of receipt of the original written challenge, move this Court for an order that the designation of ATTORNEYS EYES ONLY is appropriate. On such a motion, the party asserting confidentiality shall have the burden of proving that the designation ATTORNEYS EYES ONLY is necessary under the

circumstances. If the producing party files such a motion, then the information shall retain the ATTORNEYS EYES ONLY level of protection until the issue is resolved by the Court. Failure to make such a motion within 15 days of the original written challenge will result in the material not being considered as ATTORNEYS EYES ONLY information. To the extent comparable information is maintained as Confidential or ATTORNEYS EYES ONLY by the challenging party, this may constitute evidence in any motion that the producing party's designations were appropriate.

11. This Stipulation and Protective Order is without prejudice to the right of any party to move this Court for an Order further permitting or restricting disclosure or use of any Confidential Information.

12. Nothing in this Stipulation and Protective Order shall preclude any party from disclosing or using, in any manner or for any purpose, any information which either was lawfully in its possession prior to being designated Confidential Information in this litigation or was obtained from a third party having the right to disclose such information.

13. Nothing in this Stipulation and Protective Order shall require production of information which a party contends is protected from disclosure by the attorney-client privilege or the work product immunity. If information subject to a claim of attorney-client privilege or work product immunity is nevertheless inadvertently produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of privilege or work product immunity for such information. If a party has inadvertently produced to another party information subject to claim of immunity or privilege, the receiving party upon request shall promptly return all copies of the information and shall destroy any newly created derivative document such as a summary of or comment on the inadvertently produced information.

However, in the event that the receiving party in good faith disputes the producing party's claim as to the protected nature of the inadvertently disclosed material, this paragraph shall not apply unless and until the court determines that the documents at issue are in fact privileged or covered by the work product doctrine. In the event of a dispute over whether the inadvertently produced document is in fact privileged, the producing party has the burden of filing a motion seeking the return of the documents in question within 30 days of notifying the receiving party of its claims regarding the documents. Failure to file such a motion will result in a waiver of the claim of privilege. The producing party bears the burden of proving that the documents were inadvertently produced and are otherwise protected by a legitimate privilege or immunity. During the 30 day period after the receiving party is notified of the producing party's claim of privilege or immunity, and (if a motion is filed regarding these issues) while such motion is pending, the receiving party shall only use the allegedly privileged documents in connection with trying to resolve the dispute over the allegedly privileged nature of the document (including making the documents in question available to the court for in camera inspection), and will not disclose the contents of the documents or use the document for any other purpose.

14. In the event of any accidental or inadvertent disclosure of Confidential Information other than in manner authorized by this Stipulation and Protective Order, counsel for the party responsible for the disclosure shall promptly notify opposing counsel of all of the pertinent facts, and make every effort to prevent further unauthorized disclosure, including retrieving all copies of the Confidential Information from the recipient(s) thereof, and securing the agreement of the recipients not to further disseminate the Confidential Information in any form. Compliance with the foregoing shall not prevent the disclosing party from seeking further relief from the Court.

15. The recipient of any Confidential Information shall maintain such information in a secure and safe place, and shall exercise at least the same degree of care in handling the Confidential Information as is exercised by the recipient with respect to its own confidential information of a similar nature, but in no event less than due care. Each recipient of any Confidential Information produced in this action hereby agrees to be subject to the jurisdiction of this Court for the purposes of the implementation and enforcement of this Stipulation and Protective Order.

16. This Stipulation and Protective Order shall survive the termination of this litigation.

17. Upon termination of this litigation, all copies of documents containing Confidential Information shall be destroyed within sixty (60) days, with the exception of one archival copy of pleadings, depositions, deposition exhibits, Court exhibits and documents included in submissions to the Court which may be retained by outside counsel, and one archival set of produced documents which may be retained by outside counsel for the receiving party. Outside counsel for the receiving party shall promptly provide a written certification to the producing party that all documents containing Confidential Information which are required to be destroyed under the provisions of this paragraph have been destroyed.

18. The terms of this Stipulation and Protective Order may be applied to the documents, information and things received by a party from any person or third party who is not a party to this litigation at the election of such person or third party.

Dated: July 30, 2009.

MILLER JOHNSON

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Dated: July 30, 2009.

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By:/s/ ______________________________

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Attorneys for Defendant, Equipment Source, Inc.

IT IS SO ORDERED:

Dated: ________________________, 2009

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United Stated District Judge

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